IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 20, 2008

GERALD L. LEWIS v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2004-D-2603 Cheryl Blackburn, Judge

No. M2008-00078-CCA-R3-PC - Filed March 2, 2009

The petitioner, Gerald L. Lewis, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief. Pursuant to a plea agreement, the petitioner pled guilty to second degree murder, a Class A felony, and received an eighteen-year sentence to be served at 100%. On appeal, the petitioner contends that his guilty plea was not knowingly and voluntarily entered due to the ineffective assistance of counsel, specifically that trial counsel failed to investigate possible defenses and coerced the petitioner into accepting the plea agreement. Following review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

J. Chase Gober, Nashville, Tennessee, for the appellant, Gerald L. Lewis.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Bret T. Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The underlying facts of the case, as recited at the plea hearing, are as follows:

> Your Honor, the State's proof at trial would have been that on the 24th day of May, 2004, [the petitioner and Kenneth A. Caruthers, Jr.] were identified as two persons who were picked up by a van driver and a van passenger. The van driver's name is Alvin Corlew. The passenger is Tamika Colter.

> Mr. Corlew and Ms. Colter would both identify both of these persons - - Mr. Corlew through photo I.D.'s and Ms. Colter as a person who has known them - - as having picked them up and driven them to a location off of 11th Avenue South in Nashville, Davidson County.
>
> Both of them, Corlew and Colter, would testify that these two defendants had [run] around the front of a residence on 11th Avene South. Shots were fired, and then they came running back to the van. Mr. Corlew would state that Mr. Caruthers was armed, and Ms. Colter stated she saw what she believed to be a weapon in possession of [the petitioner].
>
> The house blocked - - they would both testify, we expect, that the house blocked their view of what actually happened. They could say what they heard and then running to and from the van.
>
> On the other side of the house would be, we expect, William Henderson III, Tyrone Dean, and Kenneth Jones, who would testify that Mr. Caruthers was armed when he came around the side of the house. Mr. Henderson was specific in the preliminary hearing that Mr. Caruthers shot the victim, Marcus McAdams, who Dr. Lee testified was killed by gunshot wounds. These three persons - - Deans, Jones, and Henderson - - would both - - Henderson identified both of these through photo line-up. I believe this entire group of people knew each other for sometime.
>
> . . . .
>
> Both of these gentlemen were arrested by Detective Robinson on May the 30th, 2004. Mr. Caruthers gave no statement. [The petitioner] stated that he admitted being there but refused to go further. His statement was, I was there, but I want an attorney.

The petitioner and his co-defendant were subsequently indicted by a Davidson County grand jury for first degree murder. A plea agreement was reached whereby the petitioner would plead guilty to second degree murder and receive an eighteen-year sentence as a violent offender. At the guilty plea hearing, the trial court extensively voir dired both the petitioner and his co-defendant prior to the acceptance of the guilty pleas. The petitioner acknowledged that he had a high school education and was literate, and he stated he was not under the influence of any medications. The petitioner also stated that his plea was not the result of any threats or promises and that he was satisfied with trial counsel's performance.

The trial court specifically noted in its discussion that the maximum sentence which would ensue for a first degree murder conviction was life imprisonment. The petitioner acknowledged that trial counsel had explained both the offenses of first and second degree murder and the potential punishments for each crime. Following the recitation of the facts by the State, the petitioner asserted

that he did not agree with certain facts as stated. However, after consultation with trial counsel, the petitioner stated that, although he did not agree with the facts, he understood that they were the facts the State could prove at trial. He further stated that, based upon those facts, it was in his best interest to accept the plea agreement. The petitioner also asked the trial court about a 30% sentence, which the court explained was not available for the charge of second degree murder. After the voir dire process, the trial court accepted the plea agreement as knowingly and voluntarily entered.

The petitioner subsequently filed a *pro se* petition for post-conviction relief, alleging that his plea was not knowingly and voluntarily entered based upon the ineffective assistance of counsel. Following the appointment of counsel, an amended petition was filed. A hearing was later held on the petition, and both the trial counsel and the petitioner testified. The testimony given by the two was contradictory on several material issues. The petitioner testified that he was sixteen years old at the time of his arrest. According to the petitioner, who acknowledged that he had never received mental health treatment, he was under a great deal of stress and had considered suicide. He also testified that he suffered from migraine headaches four to five times each week. He stated that much of the stress was the result of his fear of the death penalty, which trial counsel stated on multiple occasions that he would likely get if convicted.

The petitioner further testified that trial counsel informed him that a possible defense to the murder charge was to have his co-defendant write a letter exonerating the petitioner. According to the petitioner, he procured this letter, which stated that the petitioner was not involved in the crime. He testified that he provided trial counsel with the letter. The petitioner stated that it was his understanding that with this letter, he would not be charged with anything but would be testifying against the co-defendant. According to the petitioner, trial counsel later informed him that the letter would not support a defense and began discussing plea bargains. The petitioner was unable to produce copies of the letter at the hearing.

The petitioner acknowledged that he received and rejected two prior plea offers from the State, one being for thirty years and one for twenty-three years. He stated, however, that he accepted the eighteen-year offer only to avoid the death penalty. He asserted that he was lying at the guilty plea hearing when he stated that he understood the plea agreement, stating he was unable to pay attention during the process because all he could think about was the possibility of the death penalty. He also claimed that he felt he had been rushed through the process and did not fully understand the ramifications.

Trial counsel testified and stated that he had never informed the petitioner that there was a chance he could get the death penalty. Because the petitioner was a juvenile, the death penalty was not a possible sentence if convicted, and trial counsel stated the petitioner was aware of this. Trial counsel also testified that the petitioner never gave him a letter from the co-defendant and that there was never any discussion of the petitioner testifying against the co-defendant. Moreover, trial counsel testified that witnesses at the scene had stated that there were two shooters.

According to trial counsel, his investigator left no stone unturned in the investigation and even found some witnesses that the State had failed to find. He further testified that he reviewed the plea agreement with the petitioner, who never stated that he did not understand any part of the agreement.

Following the presentation of evidence, the post-conviction court found that trial counsel was not ineffective and that the plea had been entered knowingly and voluntarily. As such, the court denied post-conviction relief, and the petitioner now appeals that decision.

Analysis

On appeal, the petitioner contends that the post-conviction court erred in finding that his guilty plea was knowingly and voluntarily entered based upon trial counsel's ineffectiveness in failing to investigate possible defenses and in coercing the petitioner into accepting the plea agreement. In evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). In making this determination, the reviewing court must look to the totality of the circumstances. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); *see also Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). Indeed, a

> court charged with determining whether . . . pleas were 'voluntary' and 'intelligent' must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate that guilty pleas be voluntarily and intelligently made. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985) (citing *Alford*, 400 U.S. at 31, 91 S. Ct. at 164).

To succeed in a challenge for ineffective assistance of counsel, the petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the petitioner must establish (1) deficient representation and (2) prejudice resulting from the deficiency. In the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted

on going to trial." *Lockhart*, 474 U.S. at 59, 106 S. Ct. at 370; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997). The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceeding. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel, however, is dependant upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). "A trial court's *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise." *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d). However, *conclusions of law* are reviewed under a purely *de novo* standard, with no presumption of correctness. *Id*. at 458.

I. Ineffective Assistance of Counsel

The petitioner's entire argument, other than a recitation of the relevant post-conviction law, is as follows:

> [The petitioner's] guilty plea in this case was not entered into intelligently and knowingly, and was not entered with a full knowledge of the courses of action available to [the petitioner]. [The petitioner's] plea was the result of erroneous legal advice applied by trial counsel. This plea does not rise to the level required by Due Process, and was not the result of effective assistance of counsel. Had [the petitioner] been adequately represented by counsel, the result of this case would have been different because he would have rejected the State's plea bargain and proceeded to trial.

From a reading of this argument, we are somewhat unclear as to what defenses the petitioner is claiming trial counsel failed to investigate, what erroneous legal advice counsel gave, or how trial counsel coerced the petitioner into accepting the plea. We assume that the petitioner is referring to the letter purportedly written by the co-defendant and trial counsel's advice that he could get the death penalty if he did not accept the plea agreement. In denying post-conviction relief, the post-conviction court found, in relevant part, as follows:

> Trial counsel testified that he represented Petitioner from his arraignment until his plea, which was approximately one year. As to Petitioner's accusation that he was threatened with the possibility of the death penalty, trial counsel testified that he "never said that" to Petitioner. He testified that he and Petitioner never discussed the death penalty, so he is unsure how Petitioner had come up with the idea. Trial counsel pointed out that Petitioners' case was not death penalty certified so the death

penalty was never an option in this case; further [Petitioner] is a juvenile excluding the death penalty as an option. Trial counsel said he and Petitioner discussed the possibility of life in prison and what that would mean to him in that essentially he would serve 51 years.

. . . Trial counsel stated that he had gone over the plea with Petitioner all morning and that the plea was entered after lunch.

The Court finds trial counsel's testimony to be credible and corroborated by the plea hearing transcripts. As pointed out to Petitioner during the evidentiary hearing, when the Court held the plea hearing, the Court explained to Petitioner that he had been indicted with first degree murder and the only possible punishment for that offense should he be convicted is life imprisonment. . . . Petitioner acknowledged that trial counsel had explained to him the charge and the range of punishment for both first degree murder and the lesser included offense of second degree murder. . . . The death penalty was never mentioned during the plea hearing. Accordingly, the Court finds that Petitioner had failed to establish . . . that he was coerced by trial counsel to enter his plea under threat of facing the death penalty.

Further, the Court notes that during the plea colloquy, Petitioner denied that he had been threatened or coerced to accept the plea and that he was satisfied with all the work trial counsel had performed for him. . . . Other than the issue of 30% release eligibility, Petitioner had no other complaints against trial counsel.

. . . .

[With regard to investigation,] [t]rial counsel testified that Petitioner never provided him a letter written by his co-defendant where the co-defendant accepted all responsibility. If he had received the letter, trial counsel said it "may have helped", but the State's witnesses were expected to testify that there were two shooters. But, since he never received the letter he was unable to speculate how useful it would have been.

The Court finds trial counsel's testimony to be credible. There is no evidence before the Court that Petitioner's co-defendant ever wrote a letter claiming he was the only person involved with the shooting; there was no copy of the letter introduced into evidence and Petitioner did not call his co-defendant to testify that he wrote said letter. Thus, Petitioner has failed to demonstrate . . . that trial counsel was deficient in his investigation or that he was prejudiced by any alleged deficiency.

Following review of the record, we find nothing to preponderate against the post-conviction court's findings that the petitioner did not receive ineffective assistance of counsel. The post-conviction court, in reaching its conclusion, accredited the testimony of trial counsel that he had never discussed the death penalty with the petitioner and that he had never received any letter written by the co-defendant, and we will not reweigh or reevaluate the conclusion reached. *See Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). All questions involving the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley*, 960 S.W.2d at 578-79. Based upon trial counsel's testimony, the instances of alleged deficient performance were not established. Moreover, with regard to the alleged letter written by the co-defendant, the petitioner failed to produce either the letter or its author at the post-conviction hearing. His failure to do so resulted in his failure to establish any resulting prejudice. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

II. Knowing and Voluntary Plea

We also find nothing in the record to preponderate against the court's finding that the petitioner's plea was entered knowingly, intelligently, and voluntarily. As noted above, we have rejected the petitioner's contention that ineffective assistance of counsel led to an involuntary plea and further reject his contention that fear of receiving the death penalty kept him from understanding the ramification of what he was doing. The petitioner acknowledged a high school education and stated that he was literate. Trial counsel specifically testified that he explained the plea agreement to the petitioner prior to his acceptance, and the agreement contained in the record indicates that the petitioner has initialed each paragraph on the form. Trial counsel stated that he had the entire morning to review the terms of the agreement. Also of note is the fact that the petitioner rejected two prior offers from the State. The record further reflects that the petitioner appeared before the trial court and was subject to questioning regarding his acceptance and understanding of the plea agreement.

A defendant's plea of guilty constitutes an admission in open court that the defendant committed the acts charged in the indictment. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468 (1970). The plea, however, is more than an admission; it is the defendant's consent that judgment of conviction may be entered without a trial. *Id*., 90 S. Ct. at 1469. A defendant's sworn responses to the litany of questions posed by the trial judge at the plea submission hearing represent more than simply lip service. Indeed, the defendant's sworn statements and admissions of guilt stand as witness against the defendant at the post-conviction hearing when the defendant disavows those statements. Our review of the entire record affirmatively demonstrates that the petitioner's guilty plea was made with an awareness of the consequences of the plea and that his guilty plea was voluntarily and knowingly entered. *See State v. Mackey*, 553 S.W.2d 337, 340 (Tenn. 1977).

CONCLUSION

Based upon the foregoing, the denial of post-conviction relief is affirmed.

_____

JOHN EVERETT WILLIAMS, JUDGE